denied on April 26, 1965. The petition for certiorari was filed on July 23, 1965. The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the Civil Aeronautics Board properly determined that Railway Express Agency required Board authorization before undertaking operations under agreements with air carriers on the ground that the service would constitute indirect air transportation by Railway Express.

STATEMENT

Railway Express Agency, Inc. (REA) is an express company, providing both surface and air express services. In the performance of its surface express services, in which it "very largely utilizes the services of other common carriers" (*Railway Exp. Agency, Inc., Extension—Nashua, N. H.*, 91 M.C.C. 311, 330), REA is regulated as a common carrier under the Interstate Commerce Act. In its air express operations, REA utilizes the services of direct air carriers, and its operations have been held to be indirect air transportation and have been authorized by the Board order under Section 101(3) of the Act.[2]

[2] While Section 401 of the Federal Aviation Act, 49 U.S.C. 1371, prohibits engaging in direct or indirect air transportation without a Board certificate, Section 101(3), 49 U.S.C. 1301 provides that the Board may relieve an indirect air carrier of the certificate requirements of the Act if it finds it in the public interest to do so, and the Board has generally

The Board has, however, consistently denied REA's applications for authority to engage in indirect air transportation services other than air express, primarily because of the adverse competitive impact which it would have upon the air freight forwarding industry.[2]

Several years after the Board's most recent denial of REA's application for air freight forwarding authority, there were filed with the Board, under Section 412, the agreements between REA and several direct air carriers involved in the present case.[4] These agreements provided for partial carriage by air of "express traffic of the type presently moving in REA's service under tariffs on file with the ICC" (R.

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handled applications for indirect air transportation by means of orders issued under Section 101(3). For the Board's orders authorizing REA air express, see *Railway Express Agency, Grandfather Certificate*, 2 C.A.B. 531. See also *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board*, 197 F. 2d 384 (C.A.D.C.).

[2] *Air Freight Forwarder Case*, 9 C.A.B. 473, affirmed *sub. nom. American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C.A. 7); *Railway Express Agency, Airfreight Forwarder Application*, 27 C.A.B. 500, 504; *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board, supra.*

[4] Section 412(a) requires every air carrier to file with the Board all agreements "affecting air transportation * * * between such air carrier and any * * * other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges or classifications * * * or for other cooperative working arrangements." The Board is directed by Section 412(b) to disapprove any such agreement which "it finds to be * * * in violation of [the] Act" (49 U.S.C. 1382(a) (b)).

108), *i.e.*, surface express. As further summarized by the court of appeals,

> The parties agreed that the airline should receive a fixed amount for each 100 pounds of cargo carried and that REA would receive "the balance of the charges collected from the public." REA was to issue to the shipper its Uniform Express Receipt, on which it assumed responsibility to the shipper for the entire transportation, but the agreement provided that, as between themselves, each party would bear liability for damages occurring during its carriage of the shipment [Pet. App. 29].

REA contended that these agreements were simply contracts between itself and air carriers for through service and joint rates, and that such contracts were authorized under Section 1003 of the Federal Aviation Act. Section 1003 provides for the filing of joint rates by air carriers and surface carriers subject to the Interstate Commerce Act, and that the resolution of certain issues relating to such rates by joint boards composed of members of the Board and the Interstate Commerce Commission.

The Board found that there existed "substantial questions as to whether the agreements genuinely relate to joint rates for through services" or "whether operations conducted pursuant to the so-called joint rate arrangements would constitute indirect air transportation" by REA (R. 174, 114). Accordingly, it deferred action on the agreements and directed that "REA may file additional factual data, comments, or applications in accordance with the views expressed" in the Board's order (R. 119).

In response to the foregoing order, REA adduced additional factual data regarding the method of operation and the nature of its public holding out of the service, together with legal arguments as to the conclusions to be drawn therefrom (R. 121-173). Upon analysis of all of the material submitted by REA (no factual data having been submitted by any of the opponents of the plan), the Board concluded that REA's operations under the agreements would not be those of a joint carrier of through traffic, but, rather, that the agreements called for REA to undertake indirectly to engage in air transportation—an undertaking requiring Board authorization under Section 401. Since REA had failed to apply for such authority, the Board disapproved the agreements as calling for the performance of unauthorized air transportation by REA in violation of the licensing requirements of the Act (R. 186).[5]

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[5] Among the factors which led the Board to its conclusion were (1) the REA promotional literature, which was "replete" with such statements as "one-company protection and responsibility, irrespective of the mode of underlying transportation employed by REA", "all shipper and consignee contracts * * * will be with REA as with air express and the conventional all-surface express", and "REA offers air service * * *" (R. 184); (2) the shipping documentation issued to the shipper, which consisted solely of the standard REA "Uniform Express Receipt", and which indicates simply that REA "agrees to carry" the shipment (R. 182); (3) packages would be turned over to the direct air carrier in batches without any attempt to provide separate shipping documentation for each shipper (R. 185); (4) the so-called "division" of the rate under which "REA charges the shipper a rate based upon weight and distance but * * * pays the direct air carrier a standard pound rate which does not vary * * * with the

REA petitioned for reconsideration, contending for the first time that the Board was required to refer the whole matter to a joint board convened under Section 1003. The Board rejected the contention. While recognizing that a joint board had authority to pass upon the legality of joint rates, it held that only the Civil Aeronautics Board has authority to determine whether a party to an agreement requires operating authority under the Federal Aviation Act and to confer such authority (R. 252).[5]

The court of appeals affirmed. It held that the Board's determination that the agreements called for REA's operation as an indirect air carrier was supported by substantial evidence and that, "[s]ince REA is not authorized to carry on such operations, approval of the agreements was properly withheld" under Section 412 (Pet. App. 32). The court also rejected REA's contention that section 1003 "overrides" the requirement that indirect carriers be licensed by the Board (Pet. App. 32) and that "all transportation in which the cargo is carried part way by surface carrier and part way by air must be regu-

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weight of individual parcels," an arrangement which the Board found "more consistent with the role of REA as the 'retailers' of the transportation and the direct carrier as the 'wholesaler', a relationship akin to that of forwarder and direct carrier" (R. 185-186).

[5] REA also contended for the first time in seeking reconsideration that an evidentiary hearing was required. The Board rejected this view, stating that Section 412 requires no hearing and that, in any event, "the essential facts are undisputed and the solution of the issues involves primarily a legal determination" (R. 253).

lated by a joint board convened according to Section 1003(a)" (Pet. App. 33). The court found such a construction "[in]consistent with the regulatory system ordained by Congress" (Pet. App., p. 33). "The Board," it said, "is given exclusive authority and responsibility for the economic regulation of the air transportation industry" and "[n]o one is permitted to engage in air transportation, either directly or indirectly, without Board authorization" (*ibid.*). Section 1003 was held to create no exception but "merely [to] provide a procedure for regulation of rates and practices in cases where an air carrier arranges with a surface carrier for through transportation service" (*ibid.*). "But," the court continued, "when, as in this case, an arrangement for through service calls for the surface carrier to perform operations which require permission from the Board, the surface carrier is not relieved of the necessity of obtaining such permission" (*ibid.*). The court concluded that it was unable to "agree that Section 1003 has the effect of allowing REA's entry, without Board approval, into an industry expressly committed by Congress to the exclusive regulatory power of the Board" (Pet. App. 34).[1]

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[1] The court also agreed with the Board that Section 412 required no hearing and that none was required as a matter of constitutional necessity inasmuch as the "Board accepted as true the information submitted by REA" and "[t]he only issues before the Board involved the legal consequences of those facts" (Pet. App. 35).

ARGUMENT

The case was correctly decided by the court of appeals, and presents no question warranting review by this Court.

1. Section 401 of the Federal Aviation Act, 49 U.S.C. 1371, provides that "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." Under the long-established construction of the Act, indirect air carriers, such as air express companies, air freight forwarders and other carriers service organizations, are included within the coverage of Section 401 and must obtain a grant of operating authority from the Board.[8] In the present case, the Board determined that REA's operations under the filed agreements would constitute indirect air carriage. REA does not in terms question the sufficiency of the evidence supporting the Board's decision on this point, and the evidence is plainly substantial. Since REA lacks authority to conduct the air carriage proposed in the agreements, the Board properly disapproved the agreements.

2. REA contends, however, that the Board's ruling is inconsistent with Section 1003 of the Federal Aviation Act, which authorizes a surface carrier to

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[8] See *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board*, 197 F. 2d 384 (C.A. D.C.); *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C.A. 7); *Railway Express Agency, Grandfather Certificate*, 2 C.A.B. 531; *Universal Air, Investigation of Forwarding Activities*, 3 C.A.B. 698. See fn. 3, p. 3, *supra*.

collaborate with direct air carriers in jointly providing a through service for air-surface movements. The answer is, as the court below held, that the establishment of through routes and joint rates under Section 1003 requires that "each participating carrier is operating within the scope of its authority * * *. But when, as in this case, an arrangement for through service calls for the surface carrier to perform operations which require permission from the Board, the surface carrier is not relieved of the necessity of obtaining such permission" (Pet. App. 33). In short, no one may engage in air transportation, either directly or indirectly, without Board authorization. "Section 1003 is not designed to create an exception to the Board's responsibility in those cases where a surface carrier engages in operations which the Act includes in its definition of 'air transportation'" (*ibid.*). The Board properly ruled that REA could not engage in the indirect air transportation proposed in the filed agreements, since it had not made application for operating authority and satisfied the public interest criteria of the Federal Aviation Act. See H. Rep. 2254, 75th Cong., 3d Sess., p. 8.[9]

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[9] The Board's denial of REA's application for operating authority as an indirect carrier (other than for air express) in prior proceedings shows that REA may not be able to satisfy the public interest test of the Aviation Act and underscores the importance of preventing REA from evading such test, as it seeks to do in this case. While the petition urges that the Board has applied standards of indirect air carriage which makes it too difficult for a surface carrier to participate in Section 1003 rates, in the court below REA contended quite frankly that "section 1003 carved out this area of what

There is no merit to REA's contention that the determination of whether the agreements call for true joint rates or for operations requiring Board authority was one to be made by a joint board convened under Section 1003. Under the Federal Aviation Act, the Civil Aeronautics Board is given exclusive authority and responsibility for the economic regulation of the air transportation industry. It is the only agency having jurisdiction to determine whether any given operation falls within the licensing provisions of the Federal Aviation Act (Section 1002(c), 49 U.S.C. 1482), just as the Interstate Commerce Commission is the agency to determine whether surface operations require its authority under the Interstate Commerce Act. See *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 (C.A.D.C.). Section 412 directs the Civil Aeronautics Board to disapprove any agreement "that *it* finds" involves a violation of the Federal Aviation Act. The Board properly did so here.[10]

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would otherwise have been indirect air carriage, placed it under the regulation of a joint board comprised of I.C.C. and C.A.B. members, and authorized them to investigate, to modify, and to cancel joint, air surface rates and divisions agreements whenever the law or the public interest so required" (Brief, p. 15). Clearly, Section 1003 does not create any exception to the certificate requirements of the Commerce or Aviation Acts.

[10] Petitioner's contention that the Board should not be entrusted with such determinations where surface carriers are involved because of a "risk of parochial regulation" (Pet. 15) should be addressed to Congress. Also in conflict with the statutory scheme is REA's argument that the decision below

3. Finally, REA contends that it was entitled to an evidentiary hearing. In contrast with other sections of the Federal Aviation Act,[11] however, Section 412 does not require a hearing, as the court below stated (Pet. App. 35). See also *Fugazy Travel Bureau, Inc.* v. *Civil Aeronautics Board*, (C.A.D.C. No. 18496, June 18, 1965). Nor was there any constitutional requirement that REA be granted a hearing. The underlying facts were not in dispute. REA had full opportunity to submit any information it felt relevant and the Board accepted the information submitted as true. There was no factual issue before the Board. Under these circumstances, a hearing was not required. *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 281 F. 2d 919 (C.A.D.C.), certiorari denied, 365 U.S. 827; *Sun Oil Co.* v. *Federal Power Commission*, 256 F. 2d 233 (C.A. 5); *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265.

"forecloses effective collaboration * * * between the air and surface transportation industries" (Pet. 9). It is to be noted, moreover, that the argument is without merit. There are numerous tariffs on file with the Board and the Commission which provide for through services under joint rates pursuant to Section 1003. That a joint board has never been convened under that section does not mean that there has been no effective collaboration. It means only that problems requiring the attention of a joint board—*i.e.*, problems of rate discrimination, preferences, etc., have not arisen.

[11] Compare Section 401 (c), (g), (j); 402 (d), (f); 408 (b); and 1002 (c); 49 U.S.C. 1371 (c), (g), (j); 1372 (d), (f); 1378 (b); and 1482 (c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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